Supreme Court, U.S.
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No.02-187

IN THE
SUPREME COURT OF THE UNITED STATES

Jakes, Ltd., and Richard J. Jacobson,

Petitioners,

vs.

City of Coates,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITIONERS' REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

This brief is submitted for the limited purpose of replying to Respondent's brief in opposition to petition for writ of certiorari, dated September 6, 2002. To the extent that any argument set forth in said brief in opposition is not specifically addressed in this reply brief, such omission should not be considered in agreement with or concession of the validity of said argument, but rather as only reflecting Petitioners' position that the argument is dealt with adequately in the original petition.

ARGUMENT

I. THE "ADULTS-ONLY" EXEMPTION TO THE OTHERWISE ABSOLUTE PROHIBITION ON AMORTIZATION OF NON-CONFORMING USES IS UNCONSTITUTIONAL UNDER THE FIRST AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

As noted in the original petition, Minn. Stat. Sec. 462.357, Subd. 1c absolutely prohibits municipalities from enacting, amending or enforcing municipal ordinances calling for the elimination of non-conforming uses by amortization, but exempts therefrom "adults-only bookstores, adults-only theaters, or similar adults-only businesses, as defined by

ordinance." As also noted in the original petition, this "adults-only" exemption to the amortization was enacted without any legislative findings that it was necessary to combat adverse secondary effects, and without any indication in the legislative history that the enacting legislature considered any evidence whatsoever of adverse secondary effect.

In response, Respondent asserts that it need not justify such an exemption under First Amendment standards, since it is only a "enabling" statute authorizing municipalities to amortize non-conforming adult uses, a power which they had prior to the enactment of the statute.

The argument ignores two significant facts:

First of all, although it is undisputed that, prior to the enactment of the statute, municipalities had the power to amortize non-conforming adult uses, [1] the simple fact is that, prior to the enactment of the statute, municipalities had the unlimited authority to amortize all non-conforming uses, of which adult uses were only one. Compare *AVR, Inc. v. City of St. Louis Park*, 585 N.W. 2d 411 (Minn. App. 1998), pet. for

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1See *Ambassador Books & Video, Inc. v. City of Little Rock*, 20 F. 3d 858 (8th Cir. 1994), and *Holmberg v. City of Ramsey*, 12 F. 3d 140 (8th Cir. 1994).

rev. denied (Minn. Dec. 15, 1998). Consequently, the effect of Minn. Stat. Sec. 462.357, Subd. 1c was not to enable the amortization of non-conforming adult uses, but to prohibit the amortization of any non-conforming use, exempting only uses entitled to First Amendment protection, defined solely on the basis of the content of constitutionally protected speech.

Secondly, because the only exemption to the prohibition on amortization involves constitutionally protected speech, defined by content, [2] plainly, whether or not it is labeled "enabling statute" or a direct regulation of speech, it is clear that it must be subject to scrutiny under the First Amendment, either strict scrutiny if based on objection to the content of speech, or at least, intermediate scrutiny, if based upon a concern over adverse secondary effects.[3]

For example, assume that statute, instead of exempting

2As noted in the original petition, if such a definition is not "content-based," it is at least "content-correlated," as that term was defined by Justice Souter in *City of Los Angeles v. Alameda Books, Inc.*, 122 S. Ct. 1728, 1746 (May 13, 2002) Souter J. dissenting.

3Curiously, Respondent cites no authority whatsoever for the Eighth Circuit's assertion that such a "content-correlated" exemption is entitled to only "deferential rational basis" scrutiny. Appellant's Appendix at A.9, 284 F. 3d at 889.

only adults-only businesses from the otherwise absolute prohibition on amortization, exempted "mosques" or "buildings owned by the Communist Party of the United States," so that the content of one's religious practices or political beliefs determined whether a land use was subject to amortization. Plainly, there would be no question under such circumstances that the exemption would be subject to strict scrutiny as content-based discrimination, unless an affirmative showing were made that mosques or Communist Party headquarters caused adverse secondary effects which differed in degree or in kind from the secondary effects caused by uses whose amortization was prohibited. Exemption in the instant case, is likewise content correlated, and no showing has been made as to adverse secondary effects. This plainly raises a substantial federal question upon which this Court should rule.

II. A SUBSTANTIAL QUESTION EXISTS AS TO THE GRANT OF SUMMARY JUDGMENT ON THE CONSTITUTIONALITY OF THE AMORTIZATION ORDINANCE ITSELF.

In addition to challenging the constitutional validity of the statute which permits the amortization of adult uses alone, Petitioners asserted that a substantial question exists as to the validity of the amortization ordinance itself, especially given this

Court's holding in *Alameda Books*, and Petitioners' evidentiary showing that their use had caused no adverse secondary effects in eight years of existence. In response, Respondent advances two arguments, both of which are transparently without merit.

First of all, Respondent argues that because the use was similar in nature to other types of adult uses found to cause adverse secondary effects, the city "reasonably believed" that the activity may cause the negative secondary effects caused in the studies it relied upon, rendering the ordinance constitutional under *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41 (1986). What the argument ignores is this Court's clear holding in *Alameda Books*, that the "reasonable belief" is not the end all of the constitutional examination. Rather, as indicated in the plurality opinion of Justice O'Connor, even where the city passes the minimal constitutional scrutiny required under *Renton*, an adult business may challenge that "reasonable belief" by making an evidentiary showing either that the studies relied upon by the city are unreliable, or, in the alternative, by presenting affirmative evidence of the absence of secondary effects. If either such a showing is made, the burden shifts to the city to rebut the evidentiary showing. See *City of Los Angeles v. Alameda Books*, 122 S. Ct. 1728, 1736 (May 13,

2002). Given the fact that in *Alameda Books* type of showing was plainly made by Petitioners in the instant case, the reliance upon "reasonable belief" by both the District Court and the Eighth Circuit was unjustified.[4]

Respondent's second argument is evenmore lacking in merit. Respondent asserts that so long as the substantive zoning regulations are constitutional, amortization is "merely a land use tool" and thus "is not governed by *Renton* standards..." The assertion is outrageous. If anything, amortization provisions should be subject to stricter scrutiny than prospective zoning ordinances of a nature upheld in *Renton* and in *Young v. American Mini-Theaters*, 427 U.S. 50 (1976). The reasons therefor were plainly set forth by this Court in the *Young* plurality. In that opinion, this Court stated:

> "The situation would be quite different is the ordinance had the effect of suppressing, or greatly restricting access to, lawful speech. Here, however, the District Court specifically

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4As noted in the original petition, granting certiorari, vacating the Eighth Circuit's decision and remanding it for reconsideration in light of *Alameda Books* would clearly be an appropriate disposition in light of the fact that the *Alameda Books* decision was not rendered until after the Eighth Circuit decided this case.

> found that '[t]he Ordinances do not affect the operation of existing establishments, but only the location of new ones [Citation omitted, emphasis supplied.]'"427 U.S. at 71, n. 35.

Commenting upon this observation, the Ninth Circuit in *Walnut Properties, Inc. v. City of Wittier,* 861 F. 2d 1102, 1110 (9th Cir. 1988), stated, "There is little doubt that a majority would have questioned an ordinance putting all existing theaters out of business." [Citation and footnote omitted.]"

Obviously, since an amortization ordinance does not merely prospectively restrict the location of new adult establishments, but puts existing businesses out of business at their present locations, it has, if anything, a far greater potential for content-based censorship than a prospective zoning ordinance such as these in *Young* or *Renton*. It therefore, must be subject to stricter, not lesser scrutiny. Likewise, in *XLP Corp. v. County of Lake,* 743 N.E. 162, 170 (Ill. App. Dist. 2000), the court plainly noted the difference between an amortization ordinance and a prospective zoning ordinance, stating:

> "In *Renton*, there were no adult businesses in existence at the time the city enacted its ordinance. Consequently, the Supreme Court determined that the City of Renton could rely on

> the experiences of other communities, in particular those of Seattle, which had conducted detailed studies of adult use businesses, to adopt its ordinance. Here, however, where Plaintiffs had been in business for 15 years at the time Defendant enacted its ordinance, Plaintiffs' allegation that Defendant wrongly relied on outside studies instead of considering Plaintiffs' existing businesses to determine whether such businesses cause adverse secondary effects presented an issue of fact."

Finally, it should be noted that even prior to the enactment of Minn. Stat. Sec. 462.357, Subd. 1c, amortization of non-conforming uses had been the exemption in Minnesota, rather than the rule. See for example, *Freeborn County v. Claussen*, 295 Minn. 96 (1972), and *Oswalt v. County of Ramsey*, 371 N.W. 2d 241 (Minn. App. 1985), holding that non-conforming uses legal at the time a zoning ordinance is adopted or amended must be permitted to remain or eliminated by use of eminent domain. Consequently, the only time amortization was ever invoked was when a non-conforming use caused adverse secondary effects. Compare for example, *AVR, Inc.*, supra, in which the amortization of a non-conforming ready mix plant was upheld, under a rational basis-standard, while non-conforming liquor establishments were allowed to

remain, only upon an evidentiary showing that the ready mix plant caused dust, pollution, and noise not caused by the bars. See *AVR, Inc.*, supra, 585 N.W. 2d at 417.

As a result, in order to assure that the "adults-only" exemption was not enacted on the basis of objection to the content of constitutionally protected speech, it is plainly insufficient to show that adults-only businesses cause adverse secondary effects; any use subject to amortization has traditionally been so subject only because of adverse secondary effects caused. Rather, in order to justify the "adults-only" exemption to amortization under a *Young, Renton* or *Alameda Books* rationale, an evidentiary showing must be made that "adults-only" uses as defined in the statute cause adverse secondary effects which differ in either degree or in kind from those non-conforming uses whose amortization is now prohibited by statute. No such showing has been made.

CONCLUSION

For all of the forgoing reasons, as well as those reasons set forth in the original petition, the relief sought in the petition

for writ of certiorari should be, in all respects, granted.

Respectfully submitted,

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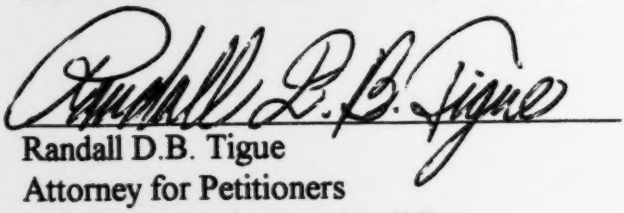

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